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No. 94-817

In The

Supreme Court of the United States

October Term, 1994

HARRIS COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSIONERS LEON GOLDSTEIN, JOHNNY ISBELL, ROBERT BENNETT, HARRIS COUNTY SHERIFF JOHNNY KLEVENHAGEN, HARRIS COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION & HARRIS COUNTY, TEXAS,

Petitioners,

vs.

S. W. STEVERSON, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The district court and the court of appeals properly decided the case. The Petitioners' questions as presented in the Writ for Certiorari fail to advise the Court that at the trial court level, Petitioners did not move for a directed verdict under Rule 50(b), Fed. R. Civ. P. Therefore, the standard on review requires affirmance if *any* evidence supports the jury's verdict.

For purposes of opposing further review of the issues raised in the Petition for Writ of Certiorari, Respondent submits the following restatement of the questions presented by Petitioners as follows:

> Whether when there are adequate alternative grounds to affirm a jury verdict on an independent basis, it is necessary for the reviewing court to access disputed questions of law not relevant to the independent basis used to affirm judgment.

PARTIES TO THE PROCEEDINGS

All parties are set forth in the caption of this case.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent S. W. Steverson, Jr. ("Steverson") respectfully submits this brief in opposition to Petitioners' request for a Writ of Certiorari to issue to review the judgment, opinion and order on petition for rehearing of the United States Court of Appeals for the Fifth Circuit filed July 21, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A to the Petition and is reported at 24 F.3d 666 (5th Cir. 1994). The unreported findings issued by the United States District Court for the Southern District of Texas is reproduced in Appendix B to the petition.

STATEMENT OF JURISDICTION

A petition for rehearing filed in the Court of Appeals was denied July 21, 1994. Petition for Writ of Certiorari was perfected October 24, 1994. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the proceeding below are as follows:

U.S. Const. Amend. I; U.S. Const. Amend. V; U.S. Const. Amend. XIV, Section 1; 42 U.S.C. § 1981; 42 U.S.C. § 1981 (as amended November 21, 1991); 42 U.S.C. § 1983; 42 U.S.C. § 2000e-2 ("Title VII"); 42 U.S.C. § 2000e-3 ("Title VII"); 42 U.S.C. § 2000e-5 ("Title VII"); and 42 U.S.C. § 1981a (effective November 21, 1991).

Pertinent portions of these constitutional and statutory provisions are reproduced in Appendix F to the petition ("Pet. App. F.").

STATEMENT OF THE CASE

This civil rights action was brought by Deputy S. W. Steverson, Jr. ("Steverson"), black, against the Harris County

Sheriff and Civil Service Commissioners of Harris County ("the Commissioners") under 42 U.S.C. §§ 1981, 1983, and 2000e, *et seq.* ("Title VII"). The Court of Appeals affirmed the district court's judgment holding that (1) the Commissioners violated Steverson's due process and equal protection rights by imposing sanctions as discipline on Steverson because he was black and in violation of his due process rights; (2) the Sheriff retaliated against Steverson for Steverson's protected activities on behalf of the Sheriff's Republican opponent; and, (3) The County was liable for disciplinary action based on race.

On the night and morning of February 27-28, 1988, Deputy Steverson was involved in an occurrence while working off duty security at the predominantly black V.W. Watkins Country Club ("the Club") located in Houston. The details of such occurrences are set out at *Steverson v. Goldstein*, 24 F.3d 666 (5th Cir. 1984). During the night of February 27-28, Sergeant Mark Walker ("Walker"), white, was called to the Club to investigate an attempted burglary near the Club. Walker had a history on more than one occasion of using racial slurs. Walker testified that at roll call, Walker had referred to black suspects as "god damn niggers." Walker testified that the term as he used it was not offensive. Once inside the Club, "Walker verbally attacked Steverson in a racial manner without cause and in the presence of nightclub members. *Id.*, 668. When the Club owner objected to Walker's treatment of Steverson, racial tensions grew. Steverson and Walker exchanged angry words. According to witnesses, violence "threatened to ensue." *Id.* Steverson attempted to file a complaint on Walker. The Sheriff, and later the Internal Affairs Division ("IAD"), at first refused to accept Steverson's complaint. After making the complaint, Steverson received a three-day suspension followed by a ninety-day probation. Walker was let off with a letter of reprimand.

Under the grievance procedure, Steverson appealed first to the Sheriff Johnny Klevehagen ("the Sheriff"), and subsequently to the Commission. After hearing the appeal, the Commission increased Steverson's punishment to include an additional seven days of suspension.

Although the Commission had the authority to modify punishment, such authority in the past had been interpreted to mean the Commission could affirm or reduce punishment. Never in the history of the Commission had it increased punishment. In its eight year history, the Commission had heard between 200 and 400 cases. Tr. Trans. 349. Never was punishment increased.

At trial, Steverson, black, attributed his discriminatory treatment to race and to his political activity on behalf of the Sheriff's Republican opponent in the 1988 election. Such activities included filing a class action Title VII lawsuit against Harris County, and founding and participating in an organization known as the African American Sheriff's Deputies League ("the League") which addressed the issue of racist treatment of black deputies. Further, the League opposed the Sheriff's re-election. During the campaign, the League publicly endorsed the Sheriff's opponent, and Steverson spoke on the radio on behalf of the Sheriff's Republican opponent, as well as appearing with the opponent in a public debate where the Sheriff was also present. Five days after the debate, Steverson was assigned an undesirable assignment to work shift from 6:00 p.m. to 2:00 a.m. Steverson was the only deputy in the department to have such hours and consequently was unable to continue his employment as a security guard.

The trial court found as a matter of law that the Commission violated Steverson's due process and equal protection rights by increasing his punishment without notice. The jury found that the Sheriff discriminated against Steverson on the basis of race and

retaliated against Steverson on the basis of political activity. Further, the jury found that race played a part in the Commission's decision to augment Steverson's discipline. Additionally, the jury found that Sheriff Klevenhagen had a policy of discriminating against blacks but found that the policy was not a moving force in the violation of Steverson's constitutional rights. The jury awarded Steverson $200,655.

At the close of all the evidence, Petitioners failed to move for a directed verdict. Therefore, the Appeals Court was bound to affirm the jury finding if *any* evidence supported the jury's verdict. *Bunch v. Walter,* 673 F.2d 127, 130-31 (5th Cir. 1982); *Wells v. State Farm Fire and Cas. Co.*, 993 F.2d 510, 512 (5th Cir. 1993); *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir. 1993).

The district court's conclusions of law and the jury's findings of fact provided various independent bases for affirming the judgment. If, as in the instant case, any of the bases enjoys adequate support in fact and law, the judgment must be affirmed. *Olney Sav. & Loan Ass'n. v. Trinity Banc Sav. Ass'n.*, 885 F.2d 266, 271 (5th Cir. 1989).

The jury found that race placed a part in the Commission's treatment of Steverson. Petitioner Appendix C ("Pet. C.") at 31a. Steverson's original discipline stemmed from a racial conflict, and the jury concluded that race played a part in the Sheriff's and the Commission's decision to affirm. Steverson is entitled to recover for the harm suffered because of the Commission's actions. Steverson prevailed on an independent bases in fact and law to support the judgment. The Appeals Court ruled properly.

SUMMARY OF ARGUMENT

At trial the Petitioners failed to make a motion for a directed

verdict at the close of all the evidence. Fed. R. Civ. P. 50(b). The standard of review, on appeal required affirmance of the judgment if *any* evidence supported the jury's verdict. ***Bunch, supra,*** 130-31; ***Wells, supra,*** 512; ***McCann, supra,*** 671. The jury found that race played a part in the Commission's treatment of Steverson. Steverson's original discipline resulted from the Sheriff's racial discrimination and thereafter was affirmed by the Commission. The Appeals Court properly found there existed an independent basis in fact and law to support the judgment and affirmed the judgment without reaching certain questions of law argued by Petitioners. ***Olney, supra.***

Should it have been necessary for the Appeals Court to reach the three questions presented by the Petitioners, such questions would not have been grounds to overturn the judgment.[1] Steverson had opposed the Sheriff by founding the Afro-American Sheriff's Deputy League, filing an EEOC charge and a Title VII class action lawsuit, openly supporting and campaigning for the Sheriff's Republican opponent in the 1988 election, including appearing at a candidate's debate, and endorsing the Sheriff's opponent on the radio. Petitioners present three questions arguing that the Appeals Court sanctions the district court's departure from the accepted and usual course of proceeding calling for the exercise of the Supreme Court's power of supervision. Specifically Petitioners argue: (1) that there was error in finding Steverson was denied due process and equal protection as a matter of law; (2) the Civil Rights Act of 1991 was erroneously applied retroactively; and (3) retaliation claims were erroneously advanced under 42 U.S.C. §§ 1981 and 1983. Such arguments must fail for the reasons set out below.

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1. In presenting its questions, Petitioners misled the Court by not acknowledging the failure of trial counsel to move for a directed verdict at the close of all the evidence.

In the history of the Commission, Steverson was the only employee ever to have his discipline increased on appeal. Such action resulted in Steverson being denied notice as required under the due process clause. *Loudermill, infra.* Because Steverson had causes of action under both §§ 1981 *and* 1983, any error in submitting claims under § 1981 was harmless error. *Simmons, Inc., infra.* Steverson had a separate cause of action under § 1983 independent of his Title VII claim and therefore was not limited to the Title VII scheme as it existed prior to November 21, 1991.

Although Steverson was entitled to equitable damages under Title VII, he also was entitled to compensatory damages under § 1983. There exists no basis under Rule 10.1 to grant the Writ. There is no broad question of general importance beyond the specific controversy of the parties. Nor did the Appeals Court sanction any departure from the accepted and usual course of proceeding. The Writ must be denied.

REASONS FOR DENYING THE WRIT

The Appeals Court must affirm the trial court's decision if there is *any* basis in fact and law to support the judgment. *Olney, supra,* 271. Because the Petitioners did not move for a directed verdict for the County or the Sheriff, the reviewing court must affirm the judgment if *any* evidence supports the jury verdict. *Bunch, supra,* 130-31; *Wells, supra,* 512.[2]

The jury found that race played a part in the Commission's treatment of Steverson. Pet. Appendix C, 31a. Petitioners argued on appeal only that there was inadequate evidence to support the jury's verdict. The Petitioners did not challenge the verdict under

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2. Under Texas law, the Sheriff is the final policymaker for § 1983 purposes. *Turner v. Upton County, Tex.*, 915 F.2d 133, 136 (5th Cir. 1980).

the any evidence standard. *Steverson, supra,* 669. Steverson's original discipline stemmed from a racial conflict. The jury concluded that race played a part in the Sheriff's racially motivated discipline. Therefore, the Appeals Court held: "Steverson can recover for the harm he suffered because of the Commission's actions." *Id.*, 669-670.

While ignoring the Appeals Court's affirmance of the judgment on an independent basis as set out above, the Petitioners present questions contending that the Appeals Court sanctioned three points of error by the trial judge. Briefly summarized, the Petitioners contend that the Appeals Court sanctioned error as follows: (1) finding that the Commission violated Steverson's due process and equal protection rights as a matter of law in increasing his discipline from three days to ten days; (2) applying the Civil Rights Act of 1991 retroactively; and, (3) concluding as a matter of law that Steverson's retaliation claim could be tried under both 42 U.S.C. § 1981 and under 42 U.S.C. § 1983. Respondent responds to such arguments below.

I.

THE COURT BELOW PROPERLY CONCLUDED THAT AS A MATTER OF LAW THE COMMISSION VIOLATED STEVERSON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS.

Commissioner Robert Bennett ("Bennett"), who served on the Commission since its inception in 1982, testified that the Commissioners had heard 200 cases and *never* increased punishment for a grievant. Tr. Trans. 349. The other Commissioners and the Commissioners' administrator concurred with Bennett. Tr. Trans. 455, 502, 578-579, 589-590. Steverson received no notice that the Commission could increase discipline and therein was denied due process. *Cleveland Bd. of*

Educ. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503, 105 S. Ct. 1487 (1985). The instant case is distinguishable from cases cited by Petitioners in that in its entire history, the Commission had *never* increased discipline on appeal. Indeed, such a practice would have had a chilling effect on appealing a grievance.[3] Further, cases cited by Petitioners do not appear to be dealing with a property interest.

The Petitioners have no claim for error as to the finding of violation of Steverson's equal protection and due process rights as a matter of law.

II.

ANY ERROR BY THE COURT BELOW AS TO WHETHER THE CIVIL RIGHTS ACT OF 1991 WAS RETROACTIVE WAS HARMLESS ERROR.

Steverson was entitled to judgment under 42 U.S.C. § 1983 for violations of his due process and equal protection rights as guaranteed under the First, Fifth and Fourteenth Amendments. Submitting the case under both §§ 1981 and 1983 at most was harmless error. Harmless error should be disregarded if it does not affect the substantial rights of the parties. *Simmons Inc. v. Pinkerton's Inc.*, 762 F.2d 591 (7th Cir. 1985).

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3. Petitioners cite *American Tel. & Tel. Co. v. FCC*, 503 F.2d 602 (2nd Cir. 1974); *California Stevedore & Ballast Co. v. OSHRA*, 517 F.2d 986 (9th Cir. 1975); *Clarkson Construction Co. v. OSHRA*, 531 F.2d 451 (10th Cir. 1976); *P.A.F. Equip. Co. v. OSHRA*, 637 F.2d 741 (10th Cir. 1980).

III.

ERROR, IF ANY, BY THE COURT BELOW AS TO WHETHER STEVERSON'S RETALIATION CLAIMS COULD BE SUBMITTED UNDER EITHER 42 U.S.C. § 1981 AND/OR 42 U.S.C. § 1983 WAS HARMLESS ERROR.

Petitioners argue that because the Civil Rights Act of 1991 is not retroactive, Steverson's § 1981 claim for retaliation is barred by *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). Because retaliation claims are also actionable under 42 U.S.C. § 1983, such error, if any, was harmless error and should be disregarded. *Simmons, Inc., supra.* Under Fifth Circuit law, the fact that constitutional claims resemble a Title VII claim does not preempt a collateral § 1983 action based on the same incident. *Wilson v. U.T. Health Center,* 973 F.2d 1263, 1268 (5th Cir. 1992). *See Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1575 (5th Cir. 1989). [Notwithstanding *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984), the Fifth Circuit holds that Title VII does not preempt a state employee's remedy under § 1983 for employment practices that violate both Title VII and the Fourteenth Amendment.] Stevenson, like the employees in *Wilson* and *Johnson*, had a First Amendment claim as well as a Fourteenth Amendment claim for retaliation. The Petitioners do not argue that the Title VII statutory scheme bars First Amendment claims under 42 U.S.C. § 1983. Therefore, Steverson was entitled to go forward under First and Fourteenth Amendment claims under § 1983.

Accordingly, the court below ruled properly as to the § 1983 claims, and the Writ should not be granted.

IV.

THERE IS NO BASIS UNDER RULE 10.1 TO GRANT THE WRIT.

Petitioners present no grounds under Rule 10.1, Rules of the Supreme Court of the United Strates, to support granting the Writ. The only ground argued by the Petitioners is sanctioning departure from accepted and usual course of judicial proceeding by a lower court. The Appeals Court had no need to address the grounds alleged by Petitioners as departure from accepted and usual course of proceeding because there existed an independent basis for affirming the judgment. *Olney, supra.* The Appeals Court properly did not address the questions presented by the Petitioners.

The petition presents no broad questions of general importance beyond the resolution of this specific controversy. On that basis alone, the Writ should be denied. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) [noting that certiorari is granted only in cses involving principles of importance to the public as distinguishable from the parties]. *See Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 79 (1955).

CONCLUSION

The Petitioners fail to present sufficient grounds to justify granting Writ of Certiorari. Because there existed an independent basis to affirm the judgment, it was not necessary for the Appeals Court to reach Petitioners' questions presented as to certain matters of law. Even if the Appeals Court had decided to address such questions of law, the Appeals Court would have found that any error was harmless error.

Accordingly, Petitioners' request for Writ of Certiorari should be denied.

Respectfully submitted,

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